

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-01789-smb

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5 In the Matter of:

6 SECURITIES INVESTOR PROTECTION CORPORATION,

7 Plaintiff,

8 v.

9

10 BERNARD L. MADOFF INVESTMENT SECURITIES,

11 Defendant,

12 - - - - - x

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 May 20, 2014

19 10:16 a.m.

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22 B E F O R E :

23 HON STUART M. BERNSTEIN

24 U.S. BANKRUPTCY JUDGE

25

1 The Fishman Trusts' Motion for a Hearing (I) to Determine  
2 Allowance of Claims and (II) Entry of an Order Allowing the  
3 Trust Claimants' Claims and Granting Related Relief (ECF  
4 5645)

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25 Transcribed by: Sherri L. Breach, CERT\*D-397

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1 P R O C E E D I N G S

2 THE COURT: Are you ready to begin?

3 MR. BUECHLER: Yes, Your Honor.

4 Bruce Buechler and Nicole Stefanelli from  
5 Lowenstein Sandler on behalf of the Yale Fishman and Glenn  
6 Fishman charitable trusts.

7 THE COURT: Thank you.

8 MR. CREMONA: Good morning, Your Honor. Nicholas  
9 Cremona of Baker Hostetler appearing on behalf of the  
10 trustee.

11 MS. ATTARD: Lauren Attard from Securities  
12 Investor Protection Corporation.

13 THE COURT: Thank you.

14 Go ahead.

15 MR. BUECHLER: Well, Your Honor, this is the  
16 motion for the Yale Fishman and Glenn Fishman charitable  
17 trusts for allowance of their claims. If I could just  
18 briefly go through what we think are the key facts that are  
19 relevant for determination in connection with this matter.

20 The Yale trust opened its account at BLMIS in  
21 August of 1998. The Glenn charitable trust opened its  
22 account at BLMIS in December of 1998. Between the date each  
23 account was opened and December 31, 2004, both the Yale  
24 trust and the Glenn trust deposited \$2 million each  
25 respectively in cash into their accounts.

1 To be clear, as we said last time we were here on  
2 the status conference, which was February 20, 2014, we are  
3 not challenging this Court or the Second Circuit's  
4 determination of how you calculate net equity, meaning cash  
5 in, cash out, but rather the dispute is how that methodology  
6 is applied to the alleged transfer from the Glenn and Yale  
7 charitable trusts respectively to the BLMIS account of  
8 another entity, the (indiscernible) Heritage Foundation.

9 THE COURT: You know I didn't think you were  
10 challenging that so much as saying the transfers never  
11 occurred for reasons that really don't have anything to do  
12 with the way you calculate net equity.

13 In other words, I thought your argument was that  
14 the transfers were fictitious and never occurred.

15 MR. BUECHLER: Correct. So -- but in allegations  
16 made by the trustee initially that we were challenging, the  
17 cash in, cash out methodology --

18 THE COURT: No. I didn't -- I did --

19 MR. BUECHLER: And I just want to be clear that --

20 THE COURT: Yeah.

21 MR. BUECHLER: -- we are not standing here --

22 THE COURT: I didn't understand you to be  
23 challenging that.

24 MR. BUECHLER: The bottom line of our position,  
25 Your Honor, is that both accounts, the Glenn and the Yale

1 charitable trusts are net losers. They're not winners or  
2 creditors with a zero balance.

3 THE COURT: How can they be net losers?

4 MR. BUECHLER: And -- let's go through the facts,  
5 Your Honor, here.

6 THE COURT: They transferred whatever they had in  
7 the account. How can they be net losers?

8 MR. BUECHLER: But, Your Honor, that's our  
9 fundamental dispute here. When they put their money into  
10 BLIS, the \$2 million each of the trust accounts went into  
11 what -- what's generally known as the 703 account.

12 THE COURT: Uh-huh.

13 MR. BUECHLER: No cash or securities were ever  
14 purchased or placed into their individual accounts.

15 THE COURT: But what --

16 MR. BUECHLER: When --

17 THE COURT: -- what does that mean? I don't  
18 understand. Accounts are just bookkeeping entries.

19 MR. BUECHLER: They may be bookkeeping entries.

20 THE COURT: I mean, it wasn't a little draw at  
21 Madoff Securities with everybody's name on a separate draw  
22 with their stocks and money in it.

23 MR. BUECHLER: No, but if I have an account that  
24 has securities in it attached to my account, then the realty  
25 -- or in my account. So if I call my broker today as Bruce

1 Buechler and say, I want to liquidate whatever shares and  
2 whatever mutual funds or shares in some corporation, there  
3 are shares attached to that account. In these accounts --

4 THE COURT: On the books -- on the books and  
5 records.

6 MR. BUECHLER: Right. And in realty.

7 THE COURT: Well, but what does that mean?  
8 They're uncertificated (sic) securities. They're just  
9 bookkeeping entries, aren't they?

10 MR. BUECHLER: But the bookkeeping entries of  
11 Madoff, there's no question, especially the account  
12 statements (indiscernible) by this Court, the trust and the  
13 Second Circuit --

14 THE COURT: I understand.

15 MR. BUECHLER: -- are fictitious.

16 THE COURT: I'm talking more generally about  
17 accounts. What are accounts?

18 MR. BUECHLER: Accounts are accounts that people  
19 have that have either cash in them, which is connected to  
20 that account, or they have securities that are there. They  
21 may be uncertificated. That may be true. But there's an  
22 account to which I have as an individual or the Glenn and  
23 Yale trust accounts thought they had at Madoff Securities  
24 that in reality never existed. There was never anything to  
25 attached to that account. And, therefore, when they

1 (indiscernible) request to liquidate and transfer their  
2 funds, no transfers actually occurred. They say that there  
3 were bookkeeping entries. There weren't bookkeeping entries  
4 because Madoff did whatever Madoff wanted to do. And when  
5 (indiscernible) Heritage ultimately authorized and gave  
6 checks to (indiscernible) Heritage, there's only one reason  
7 Madoff did that. That was to keep his Ponzi scheme going  
8 and alive. There's no double-dipping because that's their  
9 biggest argument here is --

10 THE COURT: Well --

11 MR. BUECHLER: -- to double dip.

12 THE COURT: Well, let's get to that as long as  
13 we're here. You also represent the foundation and aren't  
14 you arguing in connection with the foundation claim that a  
15 transfer did occur? You want credit for the transfers,  
16 including the fictitious profits, right?

17 MR. BUECHLER: There's no issue with the  
18 foundation at this point in time, Your Honor. We resolved  
19 that many years ago when the foundation is not asserting any  
20 claim whatsoever and is not the subject of a claw back. The  
21 foundation will not be receiving any distribution -- I mean,  
22 (indiscernible) Heritage Foundation --

23 THE COURT: Yeah.

24 MR. BUECHLER: -- will not be receiving any  
25 distribution. That was a separate client of mine and my



1 firm. As me -- as my and my firm have many other clients  
2 who are involved as creditors in the Madoff proceedings.  
3 We're here today just with regard to the Glenn and Yale  
4 accounts. The fact that we represent -- separately  
5 represented (indiscernible) is irrelevant.

6 When we were here at the status conference counsel  
7 for the trustee agreed (indiscernible) is not a party to  
8 these proceedings. At the time, yes, we took certain  
9 positions four-plus years ago in connection with the  
10 trustee's objection or determination letter with regard to  
11 the (indiscernible) Heritage claim. Separate client,  
12 separate issues, resolved.

13 (Indiscernible) Heritage is not going to be  
14 receiving any distributions and it's not the subject or  
15 never was the subject of a claw back proceeding based upon  
16 events that occurred and discussions with the trustee a  
17 number of years ago. The only claims we're talking about  
18 today are the Yale account and the Glenn account.

19 And what they attempted to do was transfer a total  
20 of approximately \$6.6 million to (indiscernible) Heritage.  
21 Their intention was never carried out. Their intention never  
22 occurred, and had (indiscernible) Heritage known that it was  
23 getting something less than it thought it was getting, it  
24 may have acted, candidly, differently as well.

25 But the bottom line here is the theory that the

1 trustee calculates accounts as cash in and cash out, and our  
2 simple position is an inter-book transfer in notation on the  
3 books and records of Madoff. And the trustee to prove his  
4 position cites extensively in his opposition to all of the  
5 Madoff account statements of Yale and Glenn Fishman which we  
6 find shocking because --

7 THE COURT: Well, but --

8 MR. BUECHLER: -- the trustee --

9 THE COURT: -- but -- wait a minute. Those  
10 account statements do show deposits. They do show  
11 withdrawals and they show the fact of transfers.

12 MR. BUECHLER: And the question is, are those cash  
13 withdrawals? The theory that this case is operating on as  
14 proved by this Court and the Second Circuit is cash in, cash  
15 out, not transfers.

16 THE COURT: Did the Court --

17 MR. BUECHLER: Cash --

18 THE COURT: Did the Court of Appeals ever rule on  
19 transfers?

20 MR. BUECHLER: It ruled it was cash in and cash  
21 out.

22 THE COURT: But that was the issue before the  
23 Court, then, correct?

24 MR. BUECHLER: Correct.

25 THE COURT: Okay.

1 MR. BUECHLER: And so the question is, is an  
2 alleged transfer, which we submit never occurred, cash out  
3 within the meaning of the Court's prior decision.

4 THE COURT: What's the difference between a  
5 transfer out and a withdrawal?

6 MR. BUECHLER: The withdrawals that all the other  
7 cases talk about is that I actually had a check written to  
8 myself or some other account that went to -- whether it was  
9 to Yale and Glenn themselves or to the American Cancer  
10 Society. They got a check in, whether it's 2005 or 2009 --

11 THE COURT: All right. I --

12 MR. BUECHLER: -- and cashed it.

13 THE COURT: -- I know what the difference between  
14 a withdrawal and a transfer is. But --

15 MR. BUECHLER: It's not the same.

16 THE COURT: -- what's the difference -- let me  
17 finish.

18 What's the difference in terms of what you have in  
19 your account?

20 MR. BUECHLER: Because what they had in their  
21 account wasn't effectuated. At the time that --

22 THE COURT: But that's what you said.

23 MR. BUECHLER: Let me explain it. At the time  
24 they took these transfers it was before the two year statute  
25 of limitations. One of the transfers -- alleged transfers

1 in question occurred between September of 2004 and the end  
2 of January 2005. If they took those as checks out, actual  
3 cash out --

4 THE COURT: Right.

5 MR. BUECHLER: -- they would never be recoverable  
6 because they're outside the two-year statute of limitations.  
7 They're -- they would not have been subject to a fraudulent  
8 conveyance or what everybody likes to call the claw back  
9 action, and it would be a separate transaction.

10 THE COURT: But that's -- that's the result of any  
11 statute of limitations.

12 MR. BUECHLER: Correct. But if they would have  
13 taken that out, they would have received \$6.6 million  
14 approximately in round numbers from those transfers out.  
15 What the trustee wants to say is, no, I'm going to count as  
16 cash out --

17 THE COURT: But if they did that they would be  
18 sued today as net winners.

19 MR. BUECHLER: They wouldn't be subject to that  
20 lawsuit because --

21 THE COURT: Oh, okay.

22 MR. BUECHLER: -- those transfers would have  
23 occurred outside the statute of limitations and they would  
24 be in a very different situation because the statute has  
25 passed.

1 THE COURT: But, you know, people have been taking  
2 -- were taking money out of the accounts over 20 years or  
3 whatever.

4 MR. BUECHLER: But that's cash out. So now when  
5 you want to apply that to an inter-account transfer to an  
6 unrelated account -- and there's no question. The Yale  
7 account, the (indiscernible) account and the Glenn account  
8 are all separate trusts. As SIPA says in its brief, each --  
9 under the regulations, each trust is a separate customer.

10 What they want to argue is that they get the  
11 benefit, arguably, of the full amount. But that's not what  
12 occurred because they didn't give (indiscernible) Heritage  
13 the benefit of the full 6.6 --

14 THE COURT: They're not arguing that.

15 MR. BUECHLER: -- as attached.

16 THE COURT: They're just saying you transferred  
17 whatever you had net in the account under the net investment  
18 --

19 MR. BUECHLER: But then they didn't get -- then  
20 they're -- then they didn't get what they intended to  
21 happen. They're relying upon --

22 THE COURT: So who --

23 MR. BUECHLER: -- the intention --

24 THE COURT: -- who didn't get what they intended  
25 to get?

1 MR. BUECHLER: Neither Glenn or Yale got what --  
2 had -- what --

3 THE COURT: Well --

4 MR. BUECHLER: -- the Yale and Glenn trusts  
5 occurred --

6 THE COURT: Wait a minute. Did the  
7 (indiscernible) Heritage foundation have a suit or rescind  
8 the transfer?

9 MR. BUECHLER: I'm not sure I -- I didn't follow  
10 your question.

11 THE COURT: In other words, the (indiscernible) --  
12 you're telling me the foundation didn't get what it thought  
13 it was getting in connection with the transfer because of  
14 the operation of the net investment --

15 MR. BUECHLER: And that's why in addition -- in  
16 this --

17 THE COURT: So why -- all I'm saying is why didn't  
18 it sue the Fishman trusts to rescind the transaction, make  
19 restitution and just be done with it?

20 MR. BUECHLER: That's something (indiscernible)  
21 Heritage did. At the outset it asserted a claim in the  
22 Madoff bankruptcy cases and in resolving the alleged claw  
23 back issue reached a resolution with the trustee. And  
24 that's something that occurred several years ago.

25 But as to the Yale account and the Glenn

1 charitable trust account, their intentions were never  
2 effectuated. There wasn't an actuality transfer because  
3 today, if I transfer monies from Bruce Buechler's account  
4 and it's a valid account and I make a gift to, whether it's  
5 my children or the American Cancer Society or something  
6 else, there's an actual transaction that occurs and there's  
7 money that goes there.

8 It turns out unbeknownst to the Glenn account, the  
9 Yale account, (indiscernible) Heritage and everybody else,  
10 there was a fraud going on. Nobody knew that at the time.  
11 Nobody knew that until after December 2008 when, excuse the  
12 expression, everything hit the fan and the world knew what  
13 was going on.

14 But the bottom line is there was no transfer.  
15 They were all separate trusts. Therefore, each one is  
16 separately a customer. There's no argument. There's no  
17 facts here that somehow this Court can pierce the corporate  
18 veil, assume that they're all alter egos of one or the  
19 other.

20 THE COURT: I don't think --

21 MR. BUECHLER: The question --

22 THE COURT: -- the trustee's arguing that.

23 MR. BUECHLER: Well, they spend a lot of time in  
24 their papers arguing that they're factually, essentially one  
25 in the same --

1 THE COURT: Well --

2 MR. BUECHLER: -- and, therefore, we should -- the  
3 Court should simply view it that way. But --

4 THE COURT: You've --

5 MR. BUECHLER: -- they're separate accounts.

6 THE COURT: You've invoked equity so they invoked  
7 equity.

8 MR. BUECHLER: Well, I'm not so sure that we've  
9 invoked equity as opposed to we've invoked the reality of  
10 the transaction. There was no actual transfer. That's our  
11 bottom line and this is different than cash out. And that's  
12 the point. What is cash out? Cash out in every other  
13 context meant cash. What the trustee wants to do here is  
14 create a fiction with regard to the transfers, but doesn't  
15 even want to give parties the full value which is what the  
16 trustee argues is the fictitious profit.

17 Our point goes further back in time which is was  
18 there actually a transfer. The fact that there were  
19 notations that says stocks or securities were liquidated.  
20 There were no stocks or securities that were liquidated.  
21 There was never ever placed into --

22 THE COURT: Can -- let me ask --

23 MR. BUECHLER: -- the Glenn and Yale accounts.

24 THE COURT: If there was no transfer, how was the  
25 Heritage foundation able to use the funds?



1 MR. BUECHLER: Because Madoff wanted everybody to  
2 believe transfers occurred, and then in time subsequent,  
3 when (indiscernible) Heritage decided it wanted to make a  
4 withdrawal -- and (indiscernible) Heritage had other money  
5 in its account predating that.

6 THE COURT: I thought it had a negative balance  
7 when the first transfer was made.

8 MR. BUECHLER: I don't -- to be honest, I don't  
9 recall the specifics of --

10 THE COURT: According to the trustee's --

11 MR. BUECHLER: -- the account --

12 THE COURT: -- proof they had a -- they had an  
13 \$870,000 negative balance in the account when the first  
14 transfer was made.

15 MR. BUECHLER: I would have to --

16 MR. CREMONA: Your Honor, I can tell you that the  
17 account -- (indiscernible) account was opened with a million  
18 dollars and the (indiscernible) objection specifically  
19 recognizes that the balance of that account was populated  
20 with the transfer from the Fishman accounts and  
21 (indiscernible) subsequently withdrew \$5.3 million. And  
22 they only --

23 THE COURT: My records --

24 Mr. CREMONA: -- put in a million to start with.

25 THE COURT: All right. My recollection was that

1 at the time of the first transfer from the Fishman accounts,  
2 which was in September, I think, of 2004 --

3 MR. BUECHLER: Correct.

4 THE COURT: -- the (indiscernible) Heritage  
5 foundation had a negative balance of \$870,000. Now I don't  
6 know if that was under the investment method or just  
7 included fictitious profits or what.

8 MR. BUECHLER: Looking at the trustee's  
9 determination letter it's -- to be honest, Your Honor, it's  
10 hard for me to determine that from here.

11 THE COURT: I think it's in that declaration -- I  
12 mean, it's summarized in the declaration backed up --

13 MR. BUECHLER: But, Your Honor, our point is may  
14 -- Madoff wanted everyone to believe that there were  
15 transfers and everything was going on, and Madoff decided to  
16 make funds available. That doesn't mean that the intention  
17 of the Yale and Glenn charitable trust accounts was  
18 effectuated to what they expected to occur as opposed to  
19 Madoff as an intervening factor deciding to make money  
20 available when (indiscernible) Heritage made a request for  
21 withdrawals. That's not double-dipping. That's not  
22 inequitable. That's unfortunately what happened as part of  
23 a Ponzi scheme effectuated by Mr. Madoff and the people that  
24 worked under him, not (indiscernible), not the Yale trust,  
25 not the Glenn trust.

1 Your Honor, it may be negative simply because of  
2 the downward adjustment of principal, but, again, just  
3 looking at the statement attached to the determination  
4 letter I can't figure out what was in the account in  
5 September of 2009.

6 MR. CREMONA: Again, based on the objection that  
7 you filed, it admits that there was a -- the account was  
8 opened with a million-dollar deposit by (indiscernible).  
9 And that's what I understand to be reflected here on  
10 2/16/1999 there's a check wire in the amount of one-million-  
11 dollars. The balance of the amounts in this account were  
12 received from inner-account transfers from the Fishman  
13 trust.

14 THE COURT: Oh, here it is. It's paragraph 11 of  
15 Mr. Segal's (ph) affidavit: "My review of the books and  
16 records of BLMIS shows that prior to the first transfer from  
17 BLMIS to the fish -- of the fish -- accounts for the Fishman  
18 trusts to the Heritage foundation account, the transferee  
19 account had a negative account balance of \$870,000, having  
20 invested a million of principal and having withdrawn  
21 \$1,870,000.

22 All right.

23 MR. BUECHLER: I'm not sure how Madoff would have  
24 allowed them prior to additional monies coming in to have  
25 made withdrawals of an additional \$870,000.

1 THE COURT: You just told me he wanted to  
2 perpetuate the scam.

3 MR. BUECHLER: That may be the answer, Your Honor.

4 But, Your Honor, the bottom line of our position  
5 is that in keeping the cash in and cash out, there were no  
6 transfers that occurred. The intention may be relevant, but  
7 there's no actual (indiscernible) transferred, which in this  
8 case would have been the delivery.

9 And simply marking on Madoff's internal records  
10 which were all fictitious and the account statements were  
11 fictitious because no funds were ever purchased, it was one  
12 slush fund (sic) in its entirety, to use the words of Judge  
13 Lifland's decision concerning the cash in, cash out.  
14 There's nothing inequitable being sought here because if the  
15 trustee wanted to be honest to the equitable position, then  
16 he would have credited the transferees for the full amounts  
17 that occurred prior to the two-year look back periods, but  
18 the trustee didn't. (Indiscernible) Heritage --

19 THE COURT: Why should the trustee credit anybody  
20 with fictitious profits?

21 MR. BUECHLER: Because if this is -- if he's  
22 arguing that if you're making transfers between accounts and  
23 you want to effectuate what the parties transferred, what  
24 Glenn and Yale intended to do was transfer the full amount  
25 of what they believed they had in the account at the time,

1 in 2004 and 2005.

2 THE COURT: But they didn't have that.

3 MR. BUECHLER: Unbeknownst to them. So, in  
4 reality, it was anything actually transferred and the  
5 reality is nothing was transferred. There's nothing  
6 inequitable being sought here because (indiscernible)  
7 doesn't have a claim at the end of the day in this case.  
8 It's going to receive no distribution. Likewise, it is not  
9 subject to a claw back because a claw back wasn't timely  
10 asserted and, therefore, all of the arguments of what --  
11 what all with (indiscernible) we submit are simply  
12 irrelevant. It's what happened with regard to the Yale trust  
13 account and the Glenn trust account, and there's nothing  
14 inequitable. They were all separate customers. They each  
15 have separate accounts. They're entitled to assert their  
16 claims.

17 And we believe they have valid claims for the  
18 delta. They've each deposited two million. They took out  
19 cash, roughly, of approximately a little over a million-  
20 five, so each one has -- as we set forth in our papers they  
21 should have allowed claims of a million-four to that extent  
22 because nothing was actually transferred, either securities  
23 --

24 THE COURT: I got it.

25 MR. BUECHLER: -- or cash. Thank you.

1 THE COURT: Thank you.

2 MR. CREMONA: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. CREMONA: I would just like to address some of  
5 the arguments made by my colleague, Mr. Buechler. I think a  
6 fundamental flaw in his argument is that he fails to  
7 recognize Judge Rakoff's recent decision on antecedent debt,  
8 which specifically rejected that whole argument that  
9 transfers made prior to the two-year reach back period are  
10 somehow not -- not credited. Specifically, Judge Rakoff  
11 said that to do so would pile fiction upon fiction and  
12 result in claimant's receiving other people's money.

13 THE COURT: I think that was Judge Harden (ph) who  
14 said that in the --

15 MR. CREMONA: In --

16 THE COURT: -- in the Bayou (sic) case.

17 MR. CREMONA: -- in Bayou. That's correct. Judge  
18 Rakoff cited him on antecedent debt. The result -- although  
19 Mr. Buechler is maintaining that he's not challenging the  
20 net investment method, the results that he's seeking would,  
21 in effect, nullify the net investment method in the Second  
22 Circuit net equity decision and fly in the face of what  
23 Judge Rakoff recently decided. And I think his argument is  
24 belied by the facts here. I think we've heard part of the  
25 story, but not the entire story.

1           So I think as a threshold matter I would point out  
2           that under SIPA 78FFF(2)(b) the claimants have the burden to  
3           demonstrate that they have a viable claim based on the  
4           debtors' books and records or to the satisfaction of the  
5           trustee. I don't believe anything has been put forth to  
6           provide a credible basis to in any way call into question  
7           the trustee's determination. I would say that they simply  
8           have not carried their burden whatsoever.

9           The crux of Mr. Buechler's argument is based upon  
10          the fact that because the securities -- there were no  
11          securities transactions and those references on the account  
12          statements are fictitious that, therefore, the transfers are  
13          fictitious.

14          But, again, he fails to recognize, as Your Honor  
15          pointed out, that there are book entries. I mean, these --  
16          there -- where -- the trustee is not solely relying on the  
17          account statements. The trustee has professionals who  
18          reviewed the books and records, reviewed the AS400 and  
19          credits and debits on the computer system, reviewed that and  
20          compared that, to the statements to the requests for  
21          withdrawals and/or to the request for inner-account  
22          transfers. And doing all of that in the aggregate is how  
23          the trustee can accurately track inner-account transfers  
24          that occurred.

25          To sit here now today and say that the transfers

1 never occurred and attempt to unilaterally rescind them  
2 under New York law, which is not prohibited as we point out  
3 in our papers, I think is a bit disingenuous especially when  
4 we have a third party here who -- whose presence is not  
5 required to resolve this dispute. But, nonetheless, we have  
6 to acknowledge the facts that are at issue. And  
7 (indiscernible) Heritage fund did, in fact, receive those  
8 transfers, all of which is demonstrated by Mr. Segal's  
9 declaration and the attachments thereto.

10 And I think it's important to just run through the  
11 facts, as Mr. Buechler said the Fishman -- the Yale Fishman  
12 trust was opened in 1998. The Glenn Fishman trust was  
13 opened also in 1998. Both were opened by Yale and Glenn  
14 Fishman. The (indiscernible) Heritage fund account was also  
15 opened in 1998 and it was opened by Glenn and Ilene (ph)  
16 Fishman. All of the accounts are related, held by family  
17 members. All of the account opening documents list the same  
18 exact address, and all of them were represented by Mr.  
19 Buechler.

20 And then I think you have to look through the  
21 facts related to the transfers between these related  
22 accounts. The trustee made his determination first based on  
23 the fact that we had clear and contemporaneous direction  
24 from the customers here to transfer the balance of their  
25 accounts in 2004 and 2005. They directed certain transfers



1 and then ultimately, in writing, directed that the transfers  
2 of the entire balance of the account be transferred to JHF.

3 And then we take -- next, we can see that the  
4 statements actually reflect those contemporaneous transfers.  
5 The debits and credits in the AS400 reflect those transfers,  
6 and the parties, as Your Honor indicated, Yale and Glenn  
7 Fishman began requesting withdrawals on behalf of JHF  
8 acknowledging that the funds were, in fact, transferred.

9 You have in -- then you have a objection filed by  
10 Mr. Buechler filed on behalf of JHF which specifically  
11 acknowledges that the transfers were made and actually  
12 funded the account in the specific amounts. And at the same  
13 time filed objections on behalf of the Fishman trust saying,  
14 no, they -- the transfers didn't occur. They should be  
15 nullified on the one hand so that JHF becomes a net loser  
16 instead of being a net winner to the amount of \$1.3 million.  
17 As we just discussed, the account for JHF was opened  
18 initially with a million-dollar deposit and \$5.3 million  
19 roughly was taken out of that account.

20 THE COURT: Does JHF still have a claim in the  
21 case? I don't understand what you're --

22 MR. CREMONA: I think that's a good question, Your  
23 Honor. I don't know why JHF was not party to this motion  
24 given that --

25 THE COURT: Well, I raised --

1 MR. CREMONA: -- their argument was --

2 THE COURT: I raised that issue at the conference  
3 and I was told that they weren't a necessary party.

4 MR. CREMONA: I understand that, Your Honor. But  
5 I think that's more a question for Mr. Buechler in terms of  
6 why they weren't included in this motion given the fact that  
7 they're similarly situated arguably.

8 THE COURT: I got the sense from Mr. Buechler,  
9 though, that their claim has been resolved.

10 MR. CREMONA: I think the -- I don't think the  
11 claim has been resolved. I think that the issue that was  
12 discussed is that the trustee in his judgment decided not to  
13 sue the charity despite the fact that they were a net --

14 THE COURT: Oh, for claw --

15 MR. CREMONA: -- winner.

16 THE COURT: -- for a claw back.

17 MR. CREMONA: Right.

18 THE COURT: Do they still have (indiscernible)?

19 MR. BUECHLER: (Indiscernible).

20 THE COURT: Sure.

21 (Pause)

22 MR. BUECHLER: Your Honor, I don't have -- I can't  
23 answer the question specifically because I don't -- I didn't  
24 review anything that occurred seven years ago when we --  
25 when we had discussions with the trustee, the

1 (indiscernible) Heritage foundation as to how we resolved it  
2 because I thought we had. We have not furthered anything  
3 with regard to the objection to the claim since we filed  
4 that objection --

5 THE COURT: Well, there --

6 MR. BUECHLER: -- in 2010.

7 THE COURT: -- there hasn't been a lot of activity  
8 with respect to any claims because of all the litigation  
9 that's been going on over the years.

10 MR. BUECHLER: True. I can't specifically answer  
11 the question because I didn't look back at that. I know we  
12 had conversations. I know with regard to (indiscernible)  
13 Heritage we provided information to the trustee in the area  
14 of -- in the way of financial information to demonstrate a  
15 financial hardship; that we would be unable to retain a claw  
16 back as part of the trust's --

17 THE COURT: No. He -- this is not about a claw  
18 back action.

19 MR. BUECHLER: I understand. With regard to the  
20 claim. I don't recall specifically if that was wrapped into  
21 it or not as part of the resolution. That's what I'm  
22 saying.

23 THE COURT: Oh, I -- I hear what you're saying.

24 MR. BUECHLER: I don't recall specifically one way  
25 or the other. And I didn't go back in preparing for this to

1 look back.

2 THE COURT: But -- okay. But your objection --

3 MR. BUECHLER: And --

4 THE COURT: Let me just -- your objection to the  
5 trustee's determination is dated November 2010 which was  
6 very close to the two-year statute of limitations.

7 MR. BUECHLER: It was a little bit after  
8 (indiscernible) Heritage. Correct.

9 THE COURT: Right.

10 MR. BUECHLER: The ones we filed for the Fishman  
11 -- the two Yale and Glenn Fishman trusts were filed in May.

12 THE COURT: I'm particularly interested if the  
13 (indiscernible) Heritage foundation still has a live claim  
14 in which it's taking a position that the transfers were  
15 made. So --

16 MR. BUECHLER: I would have to go back and check  
17 my records as to what we did at that time and I'm -- I don't  
18 want to speculate because I don't specifically recall. I  
19 didn't look at it.

20 MR. CREMONA: My understanding, Your Honor, is  
21 that is still a live claim that has not been resolved.

22 MR. BUECHLER: For the Court's record --

23 MR. CREMONA: Which is why I think we think it's  
24 very important to point out to Your Honor that there were  
25 certain admissions made and certain arguments made that

1 completely contradict the statements in the motion. And I  
2 think -- and the reason I would surmise that the -- that  
3 claim is not being prosecuted possibly because, as Your  
4 Honor noted, they were a net winner that withdraw \$1.3  
5 million more than they put in. So they -- and not only is  
6 that claim filed based on fictitious profits, it actually  
7 asks for an adjustment up to include fictitious profits --

8 THE COURT: I understand that. But -- okay. You  
9 don't know if it's still pending and you think it's still  
10 pending.

11 MR. CREMONA: I believe so, Your Honor.

12 THE COURT: Okay.

13 MR. CREMONA: Your Honor, I just would also like  
14 to point out that I think, as I mentioned earlier and as we  
15 say in our papers it would be inequitable certainly for the  
16 claimants to be able to unilaterally rescind a transfer  
17 and/or a gift that occurred. Again, they specifically  
18 acknowledge that there was an intent to donate funds to JHF  
19 and the -- those transfers did, in fact, occur under New  
20 York law. And to now, four years after the fact, after the  
21 ultimate transferee received those transfers to seek to  
22 rescind that I think would work an extremely inequitable  
23 result.

24 And I do think despite how Mr. Buechler  
25 characterized his argument is specifically would fly in the

1 face of the net investment method and Judge Rakoff's  
2 antecedent debt decision because we -- we've given credit  
3 and -- we've given credit up to the amount of the principal  
4 in the account as Your Honor noted.

5 And I think if we were to take his approach, you  
6 would be giving credence to the whim of the fraudster, which  
7 would be, as certainly the Second Circuit noted and Judge  
8 Rakoff noted again, that would be completely inconsistent  
9 with the net investment method and the objectives of this  
10 proceedings.

11 THE COURT: Thank you.

12 MR. CREMONA: Thank you, Your Honor.

13 MS. ATTARD: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MS. ATTARD: If I may, I just would like to  
16 address Mr. Buechler's argument about the 703 account at  
17 JPMorgan.

18 The fact that the assets at Madoff were comingled  
19 does not have any sort of bearing on the claimants'  
20 ownership interests. Virtually, every broker dealer in the  
21 U.S. today comingles customer assets. Assets are held in  
22 street name, the name of the broker dealer. There are book  
23 entries made by the broker dealer as to what a customer is  
24 owed. That's what Madoff did here with regard to the  
25 deposits, with regard to the withdrawals, and also with

1 regard to the transfers.

2 THE COURT: Thank you.

3 MS. ATTARD: Thank you.

4 THE COURT: I'll give you the last word.

5 MR. BUECHLER: Briefly, Your Honor,  
6 (indiscernible) two items.

7 First, with regard to the allegations as to what  
8 we said in the November 11, 2010 objection by  
9 (indiscernible) Heritage foundation to the trustee's  
10 determination letter that was set in motion by the Court's  
11 claims for procedure order dated December 23, 2008. In that  
12 objection, (indiscernible) Heritage foundation, we submit,  
13 has the right like any other party in an initial pleading to  
14 plead different theories as to why it may have a claim.

15 It said in addition in paragraph 18, "Most  
16 importantly, no cash was transferred from the Fishman trusts  
17 to the JHF account. The trustee knows this. As the Court  
18 has held, only cash deposits or withdrawals can be  
19 (indiscernible) that can be verified can be used."

20 So we also --

21 THE COURT: Look at paragraph 16. That's where  
22 you say the transfers occurred.

23 MR. BUECHLER: Paragraph 16 says:

24 "The trustee should not be permitted to take such  
25 inconsistent positions. The trustee cannot deny the claims

1 of the Fishman trusts on the grounds that the Fishman trusts  
2 transferred all of their funds to the JHF account and at the  
3 same time argue the transfers to JHF account did not occur  
4 at their full value to deny JHF's claims. Either the  
5 transfers between the accounts reflected all customer  
6 account statements should recognize this (indiscernible) or  
7 the transfer should not be recognized because they are  
8 fictitious. The trustee cannot have it both ways. The  
9 trustee's inconsistent approach is arbitrary and works a  
10 gross injustice when applied to a charitable foundation" --

11 THE COURT: So you're telling me that the transfer  
12 shouldn't be recognized as real for all purposes including  
13 the foundation's position.

14 MR. BUECHLER: It's an alternative argument, Your  
15 Honor. That's what we pled --

16 THE COURT: Well, now's the day. Which is the one  
17 you're advocating?

18 MR. BUECHLER: I'm not advocating today for  
19 (indiscernible) Heritage foundation, Your Honor. I'm for  
20 different clients. I have the right to advocate --

21 THE COURT: Sure.

22 MR. BUECHLER: -- different positions. I'm here  
23 today on behalf of the Yale and Glenn --

24 THE COURT: Don't you have a conflict?

25 MR. BUECHLER: -- Fishman trusts.



1 THE COURT: Don't you have a conflict?

2 MR. BUECHLER: No, Your Honor. First of all, the  
3 clients have waived any conflict that may have existed.

4 Second of all, I have to check into whether  
5 (indiscernible) Heritage foundation (indiscernible) is  
6 actually pursuing its claim in the Madoff case which, as I  
7 said to be fair, I didn't think about that question. I  
8 haven't checked it. I haven't looked at anything for  
9 (indiscernible) Heritage --

10 THE COURT: Well, they did -- they did raise it.

11 MR. BUECHLER: -- in a number of years.

12 THE COURT: They did raise it in their response.

13 MR. BUECHLER: It may be fair, Your Honor, but I  
14 can't (indiscernible) say because I didn't check. I can  
15 check and report back if you would like me to.

16 Point one on that.

17 The other point with regard to Judge Rakoff's  
18 recent decision with regard to the antecedent debt decision,  
19 we submit that that decision doesn't have any relevance to  
20 this dispute. This matter -- what Judge Rakoff was deciding  
21 was an issue under 548 of the Code and, specifically, under  
22 548(c) what constituted value in the context of the defenses  
23 or potential defenses to fraudulent conveyance actions. The  
24 matter before Your Honor has nothing to do with a fraudulent  
25 conveyance. It has nothing to do with 548(c) of the code.

1 THE COURT: So why are you relying on 546(e) and  
2 saying that they can't net more than two years before the  
3 filing date. If this isn't an avoidance action those rules  
4 have no relevance.

5 MR. BUECHLER: There's a separate argument, Your  
6 Honor. We're saying that demonstrates the inequity of the  
7 trustee's position. Our bottom line argument is that there  
8 were no transfers that actually occurred. There was no cash  
9 out of either the Glenn or Yale Fishman charitable trust to  
10 the (indiscernible) trust and, therefore, those trusts  
11 should not be zero balances asserted by the trustee in his  
12 determination letter, but rather they should be net losers  
13 because there are still funds in their account because  
14 nothing was transferred out.

15 And the trustee can say what they want with regard  
16 to the Madoff accounts, but at the end of the day they were  
17 fictitious. The fact that Madoff -- Mr. Madoff made account  
18 notations to keep his Ponzi scheme alive should not be  
19 utilized to the disadvantage of creditors such as my two  
20 clients.

21 And let's be honest, Your Honor. They're victims  
22 of the Madoff fraud. They're not here --

23 THE COURT: No. I -- they didn't lose any money.

24 MR. BUECHLER: They put \$2 million into these  
25 accounts and expected that they would grow and make \$2

1 million out.

2 THE COURT: But that I -- that I understand.

3 MR. BUECHLER: Okay.

4 THE COURT: Everybody --

5 MR. BUECHLER: Everybody's in that --

6 THE COURT: -- is in that boat. Right.

7 MR. BUECHLER: -- boat.

8 THE COURT: But some were more unfortunate than  
9 others because at the end of the day they put in more than  
10 they took out.

11 MR. BUECHLER: And my clients took out in cash  
12 roughly \$515,000 --

13 THE COURT: Correct.

14 MR. BUECHLER: -- each in cash, a piece in cash  
15 out. They may have attempted to transfer, but the transfer  
16 never occurred.

17 THE COURT: But if the --

18 MR. BUECHLER: And if --

19 THE COURT: -- transfer did occur, then they  
20 didn't lose anything.

21 MR. BUECHLER: If the Court determines it  
22 occurred.

23 THE COURT: Right.

24 MR. BUECHLER: And our view is that had it  
25 occurred, if you want to look at what their intentions are

1 under New York State law, what they intended was 6.6  
2 million. That never occurred. And then to arbitrarily go  
3 back after the fact --

4 THE COURT: That's -- there's no evidence of that.  
5 They wrote letters saying transfer the balance of my  
6 account. They didn't say any specific sum, and that's  
7 exactly what happened here, isn't it?

8 MR. BUECHLER: And they were relying upon what was  
9 in their account statements and, therefore, arguably  
10 (indiscernible) Heritage, when it got its account statement  
11 the next month and two thereafter saw that it was credited,  
12 if you want to take that argument to its fullest extent,  
13 with 6.6 million, not a lesser sum.

14 THE COURT: I understand that.

15 MR. BUECHLER: And they may have acted different  
16 --

17 THE COURT: So that --

18 MR. BUECHLER: They may have acted very  
19 differently --

20 THE COURT: That's why --

21 MR. BUECHLER: -- had they known.

22 THE COURT: Well, you know, that's why I say, and  
23 I'm not being facetious, that, you know, under New York law  
24 maybe (indiscernible) Heritage foundation had a rescission  
25 claim against the Fishman trusts. Obviously, it wasn't

1 going to pursue that claim and make restitution. But that  
2 -- that's an issue between the transferor and the  
3 transferee, isn't it?

4 MR. BUECHLER: But to have a transfer under New  
5 York State law, as we cite in the pages 9 to 12 -- excuse me  
6 -- 10 to 12, I believe, of our reply brief requires that  
7 there be actual delivery --

8 THE COURT: Or --

9 MR. BUECHLER: -- of the gift.

10 THE COURT: Or constructive.

11 MR. BUECHLER: Or constructive. There was no  
12 delivery.

13 THE COURT: All right. I got it.

14 MR. BUECHLER: That's our point.

15 Thank you.

16 MR. CREMONA: Your Honor, if I may just -- because  
17 I would like to correct something that was just stated and,  
18 I think, contradicts what Mr. Buechler said.

19 The operative paragraph in his objection on behalf  
20 of JHF is paragraph 13 which says:

21 "Likewise, the trustee's denial is not supported  
22 by the uncontroverted facts in the case that \$7.5 million  
23 was deposited into the account and only 5.3 was withdrawn.  
24 The transfers made from the Fishman trust to JHF constitute  
25 'cash in.' The trustee's attempt to reduce the amount of

1 the transfers from the Fishman trust to the JHF account is  
2 contrary to what occurred in reality. The Fishman trusts  
3 made six separate transfers to the JHF account, all of which  
4 constitute 'cash in.' Had the Fishman trust taken the cash  
5 out of their accounts and then deposited the cash into JHF  
6 account rather than transferring the funds between the  
7 accounts, then without a doubt there would be no issue as to  
8 JHF."

9 THE COURT: I had the wrong paragraph.

10 MR. BUECHLER: I don't -- I just answered Your  
11 Honor's question as to the specific paragraph.

12 THE COURT: You're right. You're right. I  
13 thought it was paragraph 16, but it's paragraph 13.

14 MR. BUECHLER: I only read the paragraph Your  
15 Honor asked me to. I --

16 THE COURT: Okay. You're --

17 MR. BUECHLER: We concede.

18 THE COURT: You were right, Mr. Buechler.  
19 We'll take a brief recess and then I'll rule.

20 MR. BUECHLER: Thank you.

21 MR. CREMONA: Thank you, Your Honor.

22 (Recess taken at 10:52 a.m.; resume at 11:07 a.m.)

23 THE CLERK: All rise.

24 Be seated.

25 THE COURT: The irrevocable charitable remainder

1 trust of Yale Fishman (the "Yale Trust") and the Glenn Akiva  
2 Fishman charitable remainder unitrust (the "Glenn" trust and  
3 together with the Yale trust the "trusts") move for the  
4 allowance of their claims which Irving Picard, the trustee  
5 of the debtor, Bernard L. Madoff Investment Securities, LLC  
6 ("Madoff Securities") has determined to disallow. Each  
7 trust held an account with Madoff Securities and directed  
8 Madoff Securities to transfer the remaining balances in  
9 their accounts to the (indiscernible) Heritage foundation  
10 (the "foundation"), a charitable organization.

11 According to the trust, the foundation is operated  
12 by a Rabbi Eli Fishman and Ilene Fishman, the parents of  
13 Yale Fishman ("Yale") and Glenn Fishman ("Glenn"). However,  
14 at the relevant time Glenn was an officer and, as discussed  
15 below, he and Yale had authority to withdraw funds from the  
16 foundation's account.

17 The trusts argue principally that the transfers  
18 never took place for a variety of reasons and Picard is  
19 precluded from arguing otherwise.

20 Accordingly, the transfers should be disregarded  
21 and the trusts' claim should be valued under the net  
22 investment method endorsed by the Second Circuit in *In Re:*  
23 *Bernard L. Madoff Investment Securities, LLC*, 654 Fed. 3d.  
24 229 (2nd Circuit 2011) ("net equity decision"), *Circ. denied*  
25 133 U.S. 24 (2012).

1 For the reasons that follow their motion is denied  
2 and Picard's decision to disallow the claims is approved.

3 The facts are derived from the documents attached  
4 to the declaration of Dineet Sehgal of Alex Partners, LLP.  
5 The authenticity of these documents has not been disputed.

6 The Yale trust was established some time prior to  
7 August 18, 1998 and Yale and Glenn are -- were co-trustees.  
8 On August 18, 1998, they signed a trading authorization  
9 limited to purchases and sales of securities and options on  
10 behalf of the Yale trust and Madoff Securities assigned it  
11 account number 1-CM543-4-0 (the "Yale trust account").

12 Between August 24, 1998 and December 31, 2004, \$2  
13 million was deposited into the Yale trust account. Between  
14 April 14, 1999 and July 21, 2004, the Yale trust withdrew a  
15 total of \$515,778.87 from its account. Although the account  
16 statements provided by Madoff Securities indicated a larger  
17 balance inflated by fictitious profits, the parties agree  
18 that following the last withdrawal the balance or net equity  
19 in the account was \$1,484,221.13 under the net investment  
20 method.

21 On September 28, 2004 Yale wrote to Madoff  
22 Securities asking it to transfer \$250,000 from the Yale  
23 trust account to account number 1-CM568-3-0 held in the name  
24 of the foundation ("the foundation account"). The transfer  
25 occurred on September 29, 2004 as reflected in the account



1 statements provided to the Yale trust and the foundation.

2 On December 30, 2004 Yale issued instructions to  
3 Madoff Securities on behalf of the Yale trust to "transfer  
4 the whole balance in my account" to the foundation account.  
5 The letter further directed Madoff Securities to close the  
6 Yale trust account once the balance was zero. At the time,  
7 the Yale trust account reflected a positive balance of  
8 \$3,101,924.80 and the Madoff Securities' records show that  
9 this amount was transferred to the foundation account in  
10 accordance with the letter instruction the next day. In  
11 fact, the balance in the account computed under the net  
12 investment method was only \$1,234,221.13.

13 As a result, the Yale trust account purported to  
14 transfer \$1,868,360.50 more than was actually in the  
15 account. Following the transfer, the balance in the account  
16 was zero.

17 The transactions in the Glenn trust account  
18 followed a similar pattern. The Glenn trust account -- the  
19 Glenn trust opened account number 1-CM-552-4-0 ("The Glenn  
20 trust account") with Madoff Securities on December 8, 1998  
21 and Glenn and Yale signed the trading authorization  
22 agreement.

23 Between December 15, 1998 and December 29, 2000,  
24 \$2 million was deposited into the Glenn trust account and  
25 through July 21, 2004 the Glenn trust account withdraw

1 \$513,410.

2 The parties agree the balance in the Glenn trust  
3 account following the last withdrawal was \$1,486,590 as  
4 computed under the net investment method, although the  
5 account statements reflected more as a result of the  
6 fictitious profits.

7 On September 28, 2004, the Glenn -- the Glenn  
8 trust issued a written direction to Madoff Securities to  
9 transfer \$250,000 to the foundation account and the  
10 statements for each account reflected the transfer.

11 On December 30, 2004, the Glenn -- Glenn  
12 instructed Madoff Securities, on behalf of the Glenn trust,  
13 to "transfer the full balance of my account" to the  
14 foundation account and close the Glenn trust account once  
15 the balance was zero. At the time the Glenn trust account  
16 reflected a positive balance of \$2,950,112.99 and the Madoff  
17 Securities' records show that the amount was transferred to  
18 the foundation account in accordance with the letter  
19 instruction the next day.

20 In fact, the balance in the account computed under  
21 the net investment method was only \$1,236,590. As a result,  
22 the Glenn trust account purported to transfer in excess of  
23 \$1.7 million more than was actually in the account.

24 Following this transfer, the Glenn trust account  
25 reflected a balance of \$633.42 which was transferred to the

1 foundation account on January 31, 2005 zeroing out the Glenn  
2 trust account.

3 As a result of the transactions just described,  
4 the balances in both trusts' accounts were zero whether or  
5 not fictitious profits are credited or ignored. The trust  
6 nevertheless filed claims with Picard that ignored the  
7 transfers to the foundation accounts and sought to recover  
8 the net equity in each account immediately prior to the  
9 transfers. Picard determined that neither claim was  
10 allowable because in each case the balance in the account  
11 was zero as a result of the transfers initiated by each  
12 trust.

13 The trusts now seek to have these claims allowed.  
14 They argue the transfers fictitious citing the net equity  
15 decision and also contend that there was never anything in  
16 the trust accounts to transfer. In addition, they maintain  
17 that principals of judicial estoppel and law of the case  
18 prohibit Picard from contending that the fictitious  
19 transfers actually occurred. And even if the transfers  
20 occurred, the trustee is barred from Bankruptcy Code Section  
21 546(e) from netting transactions that occurred more than two  
22 years before the filing date.

23 The analysis begins with the New York law of  
24 gifts. A valid (indiscernible) requires proof of three  
25 elements: One, the donor's intent to make a valid transfer;

1 two, the actual or constructive delivery to the donee; and,  
2 three, acceptance by the donee. Gruen versus Gruen, 496 NE  
3 2nd 869, 872 (New York 1986); In re: Szabo's Estate, 176 NE  
4 2nd 395, 396 (New York 1961).

5 The trusts concede the first element. They admit  
6 they intended to transfer the remaining balances in their --  
7 to the foundation account (trusts' reply at paragraph 35),  
8 and their written directions to Madoff Securities confirm  
9 their intent.

10 The trusts must also concede the third element, to  
11 wit: That the foundation accepted the transfers. To begin  
12 with, there is no evidence that the foundation rejected the  
13 transfers when they were made. The suggestion was made at  
14 oral argument that the trusts thought they were giving more  
15 and the foundation thought it was getting more. But that is  
16 a matter between the parties to the transfers and there has  
17 been no effort to rescind the transfers.

18 In addition, prior to the first transfer from the  
19 trusts, the foundation accounts had a negative balance of  
20 \$870,000. The only additional deposits were the transfers  
21 directed by the trusts. By February 5th, 2005, after the  
22 last trust transfer, the balance in the foundation account  
23 was \$2,100,811.13 although the fictitious profits made it  
24 seem larger. Either Glenn or Yale and Glenn requested  
25 withdrawals on behalf of the foundation aggregating

1 \$3,451,000 from Madoff Securities and received checks in  
2 that amount drawn on the Madoff Securities' JPMorgan  
3 account.

4 Under the net investment method the foundation  
5 account was overdrawn by \$1,350,188.87 meaning the  
6 foundation was able to draw some of the fictitious profits  
7 "transferred" by the trusts. Thus, the foundation got the  
8 benefit of the transfers and relied on the transfers,  
9 including the fictitious profits in computing and submitting  
10 its own claim in this case. Instead, the trusts focus on  
11 the second element arguing that the transfers were  
12 fictitious and never occurred.

13 The argument is inconsistent with the obvious fact  
14 that the foundation benefited from the transfers and,  
15 moreover, is belied by the documentary evidence submitted by  
16 Picard. That evidence demonstrates that Madoff Securities  
17 constructively delivered the transfers through a series of  
18 bookkeeping entries that zeroed out the balances in the  
19 trusts' accounts and increased the foundation's account by a  
20 comparable sum.

21 In the case of Yale trust, Madoff Securities  
22 transferred \$3,101,924.84 of which \$1,868,360.58 was  
23 fictitious profits. The fictitious profits must be  
24 disregarded in calculating the value of what was  
25 transferred, In re: Bernard L. Madoff Investment Securities,

1 LLC, 499 B.R. 416, 428-29 (SDNY. 2013); In re: Bayou Group,  
2 LLC, 396 B.R. 810, 885 (Bankr. Court SDNY 2008), affirmed in  
3 part and reversed in part, 439 B.R. 284 (SDNY 2010), and  
4 accordingly the actual transfer was \$1,234,221.13.

5 Similarly, Madoff Securities transferred  
6 \$2,950,112.99 in connection with the Glenn trust transfer,  
7 but this included \$1,713,522.99 in fictitious profits.  
8 Consequently, the actual transfer was \$1,236,590. As noted,  
9 the trust did not challenge the use of the net investment  
10 method to calculate the net equity in the accounts  
11 immediately prior to the transfers.

12 The trusts' argument that the transfers never  
13 occurred is belied by the facts just discussed and  
14 unsupported by their principle legal authority. The net  
15 equity decision, which they cite, rejected the position that  
16 net equity should be determined by the balance shown on the  
17 final account statement observing that account statements  
18 included fictitious information and that "the only accurate  
19 entries reflected the customer's cash deposits and  
20 withdrawals" 654 Fed. 3d. at 232.

21 From this the trust reasoned -- the trusts reason  
22 that the transfers were not withdrawals, don't count and  
23 consequently the transfers were fictitious.

24 The Court of Appeals did not address inter-account  
25 transfers, although the effect of the withdrawal and the

1 transfer is the same when computing net equity under the net  
2 investment method. Following the transfers, the account  
3 balances fell to zero just as they would have if the trusts  
4 had withdrawn all of the funds instead of transferring them.

5 Furthermore, because the trusts transferred  
6 everything they had, they did not lose any money in Madoff's  
7 Ponzi scheme, nor did the Second Circuit consider or decide  
8 whether the Madoff Securities' statements accurately  
9 reflected enter account transfers. In fact here, the  
10 account statements accurately reflected the amount of the  
11 \$250,000 transfers. And although the account statements  
12 showed final transfers inflated by fictitious profits, they  
13 nevertheless reflected the fact that the remaining balances  
14 were transferred to the foundation account at Glenn's and  
15 Yale's direction.

16 The trusts also have failed to explain how the  
17 foundation was able to use the transferred funds if the  
18 transfers were fictitious and never occurred. As noted, the  
19 foundation, through Yale and Glenn, withdrew \$3,451,000 from  
20 its account. But for the transfers into the account by the  
21 trusts, there would have been nothing to withdraw.

22 Furthermore, the trusts and the foundation have  
23 taken inconsistent positions regarding the transfers. The  
24 trusts argue that the transfers do not constitute  
25 withdrawals under the net equity decision, but the

1 foundation maintained that the transfers count as deposits.  
2 As a result, the foundation's proof of claim sought credit  
3 for the transfers in calculating its net equity, while the  
4 trusts' proofs of claim essentially demand the same benefit  
5 by ignoring them.

6 Although the foundation is a separate entity,  
7 Glenn was an officer of the foundation during the relevant  
8 period and Yale and Glenn withdrew \$3,451,000 from its  
9 account.

10 In addition, the trusts and the foundation are  
11 represented by the same counsel who ironically accused  
12 Picard of taking inconsistent positions (objection to  
13 trustee's determination of claim of (indiscernible) Heritage  
14 foundation, Inc. dated November 11, 2010 at paragraph 16  
15 (ECF Document Number 3143).)

16 Picard, however, has taken the consistent position  
17 that he must ignore fictitious profits when computing net  
18 equity and has applied this rule in calculating the amount  
19 of the transfers.

20 The trusts also argue that because Madoff never  
21 deposited cash into or bought securities for either trust  
22 account there was never anything in the trust accounts to  
23 transfer and no transfers from the trust accounts to the  
24 foundation ever occurred or could have occurred (Trusts'  
25 reply at paragraphs 1 and 36.)



1           Although Madoff defrauded the investors and  
2           misused their investments, he did not steal the funds from  
3           the accounts, at least as the trusts mean it, anymore than  
4           Picard restored funds to the accounts. The trusts' accounts  
5           consisted of bookkeeping entries, some correct, but most  
6           fictitious.

7           Notwithstanding the fictitious investments listed  
8           on the account statements, the accounts have value. The  
9           trusts withdrew one million dollars for their personal  
10          benefit before they transferred the remaining balances, and  
11          now seek to recover the balance of their pre-transfer net  
12          equity through their motion. If there was never anything in  
13          their accounts, there would have been nothing to withdraw  
14          and nothing left to recover. The accounts plainly had value  
15          and the trusts transferred the remaining value net of their  
16          withdrawals to the foundation.

17          The arguments regarding law of the case and  
18          judicial estoppel deserve short thrift. They are based on  
19          the erroneous assumption that Picard argued and the Second  
20          Circuit agreed that the recorded inter-account transfers  
21          were fictitious and the only accurate records maintained by  
22          Madoff Securities related to the cash in and cash out.  
23          Picard never argued and the Court never decided that the  
24          records of transfers should be ignored, and for the reasons  
25          stated the records accurately reflected the fact of the

1 transfers even if they did not always reflect the correct  
2 amount.

3 The arguments -- the trusts' argument that  
4 Bankruptcy Code Section 546(e) limits Picard's look back  
5 period to two years before the filing date has already been  
6 rejected by Judge Rakoff. Section 546(e) limits a  
7 bankruptcy trustee's avoiding powers in a case involving  
8 settlement payments made in connection with securities'  
9 contracts.

10 With certain exceptions that are not relevant to  
11 this case, Picard can only recover intentional fraudulent  
12 transfers made within two years of the filing date. Picard  
13 versus Greiff, 476 B.R. 715, 718 (SDNY 2012); Picard versus  
14 Katz, 462 B.R. 447, 452 (SDNY 2011).

15 Nevertheless, in computing net equity under the  
16 net investment method Picard used net cash in and net cash  
17 out over the entire life of the investment. 476 B.R. at  
18 729. Judge Rakoff subsequently rejected the argument that  
19 the netting of deposits and withdrawals before the two-year  
20 period violated the two-year period of limitations  
21 applicable to avoidance actions. In re: Bernard L. Madoff  
22 Investment Securities, LLC, 499 B.R. at 427.

23 Although Judge Rakoff was considering the concept  
24 of value under Bankruptcy Code Section 548(c), his reasoning  
25 applies equally to this case and I reject the trusts'

1 argument for the same reason.

2 Finally, the trusts argue that Picard has failed  
3 to carry his burden of going forward with evidence to rebut  
4 the presumption that the trusts' claims are valid. The  
5 claimant bears the ultimate burden of proving its claim to  
6 customer property. In re: Bernard L. Madoff Investment  
7 Securities, LLC 2014 Westlaw 1302660, at page 6 (SDNY March  
8 31, 2014).

9 A properly completed proof of claim is prima facie  
10 evidence of the validity and the amount of the claim, In re:  
11 MF Global, Ltd. 2012 Westlaw 5499847 at page 3 (Bankr. SDNY  
12 November 13, 2012); Federal Rule of Bankruptcy Procedure  
13 3001(f), but if the objecting party produces evidence to  
14 rebut the presumption, the burden of going forward shifts  
15 back to the claimant who must prove its claim by a  
16 preponderance of the evidence. MF Global, 2012 Westlaw  
17 5499847, at page 3.

18 Picard produced ample evidence discussed  
19 previously to demonstrate that the transfer to the  
20 foundation occurred resulting in zero balances in the  
21 trusts' accounts and an increased balance in the foundation  
22 account. The trusts have not come forward with any contrary  
23 evidence to prove that the transfers did not occur and,  
24 hence, have failed to sustain their burdens of proof.

25 Accordingly, the trusts' motion is denied. I have

1 considered the trusts' remaining arguments and conclude that  
2 they lack merit.

3 Submit an order.

4 Thank you.

5 MR. CREMONA: Thank you, Your Honor.

6 MR. BUECHLER: Thank you, Judge.

7 THE COURT: Thank you.

8 (Whereupon these proceedings concluded at 11:30 AM)

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I N D E X

RULINGS

Page Line

The Fishman Trusts' Motion for a  
Hearing (I) to Determine Allowance  
of Claims and (II) Entry of an Order  
Allowing the Trust Claimants' Claims  
and Granting Related Relief (ECF 5645) 40 1

C E R T I F I C A T I O N

I, Sherri L. Breach, CERT\*D-397, certified that the  
foregoing transcript is a true and accurate record of the  
proceedings.

Sherri L  
Breach

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DATE: May 20, 2014